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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ASSOCIATED GAS DISTRIBUTORS AND
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 15, 1986

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QUESTION PRESENTED

Whether valuable in-kind consideration may be disregarded by the Federal Energy Regulatory Commission in its enforcement of congressionally-mandated ceiling prices for first sales of natural gas?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below included petitioners Associated Gas Distributors * and New York Public Service Commission; respondent Federal Energy Regulatory Commission; Amerada Hess Corporation; Aminoil Inc.; Amoco Production Company; ANR Pipeline Company; Arco Oil and Gas Company; Ashland Exploration, Inc.; Cabot Petroleum Corporation; Chevron U.S.A., Inc.; Cities Service Oil and Gas Corporation; Colorado Interstate Gas Company; Conoco Inc.; Diamond Shamrock Corporation; Elf Aquitaine, Inc.; Exxon Corporation; Getty Oil Company; Gulf Oil Corporation; A.G. Hill; Estate of H.L. Hunt; Hassie Hunt, Inc.; Hunt Industries; Hunt Oil Company; Hunt Petroleum Corporation; Caroline Hunt Schoellkopf; Caroline Hunt Trust Estate; Lamar Hunt; Lamar Hunt Trust Estate; N.B. Hunt; W.H. Hunt; W.H. Hunt Estate; Secure Trusts; Inexco Oil Company; Interstate Natural Gas Association, Inc.; Kerr-McGee Corporation; Marathon Oil Company; Mitchell Energy Corporation; Mobil Oil Corporation; Mobil Producing Texas & New Mexico Inc.; Mobil Oil Exploration & Producing Southeast Inc.; Monsanto Oil Company; Natural Gas Pipeline Company of America; Panhandle Eastern Pipeline Company; Panhandle Trunkline Gas Company; Pennzoil Company; Pennzoil Producing Company; Pennzoil Oil & Gas, Inc.; Pennzoil Louisiana and

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* In accordance with Rule 28.1, the list of parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Associated Gas Distributors is included as an Appendix to this petition.

Texas Offshore, Inc.; Phillips Petroleum Company; Phillips Oil Company; Pinto, Inc.; Placid Oil Company; Sea Robin Pipeline Company; Shell Oil Company; Shell Offshore Inc.; Shell Western E&P Inc.; Sohio Petroleum Company; Southern Natural Gas Company; Sun Exploration and Production Company; Tenneco Oil Company; Tennessee Gas Pipeline Company; Texaco Inc.; Texas Eastern Transmission Corporation; Transwestern Pipeline Company; Texas Production Company; The Superior Oil Company; Transcontinental Gas Pipe Line Corporation; Union Oil Company of California; United Gas Pipe Line Company; and Williams Exploration Company.

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Associated Gas Distributors ("AGD" or "Petitioners"), an unincorporated association of East Coast gas distribution companies appearing herein jointly and severally, and the Public Service Commission of the State of New York petition for a writ of certiorari to review Section III of the August 19, 1985 decision of the United States Court of Appeals for the Fifth Circuit in *Texas Eastern Transmission Corp., et al. v. Federal Energy Regulatory Commission*, Nos. 83-4390, 83-4162, and 85-4182.

OPINION AND ORDERS BELOW

The August 19, 1985 decision of the court of appeals and its October 17, 1985 order denying petitions for rehearing of Section III of that decision are not yet reported. The Declaratory Order of the Federal Energy

Regulatory Commission ("FERC" or "Commission") is reported at 22 FERC ¶ 61,013 (1983) and the Commission's order on rehearing is reported at 24 FERC ¶ 61,004 (1983). These orders are reprinted in an appendix to the petition for a writ of certiorari filed by Transcontinental Gas Pipe Line Corporation, *et al.* ("Pipelines' Petition"), (App. ———).

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1985. The order denying petitions for rehearing was entered on October 17, 1985.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute upon which the court of appeals' decision is based is the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982) ("NGPA"), the relevant portions of which appear in the appendix to the Pipelines' Petition (App. ——). Section 504(a)(1) of the NGPA provides that:

> (a) *General rule.*—It shall be unlawful for any person—
>
> (1) to sell natural gas at a first sale price in excess of any applicable maximum lawful price under this chapter. . .

15 U.S.C. § 3414 (1982).

STATEMENT OF THE CASE

A. Factual Background

Title I of the NGPA establishes maximum lawful prices for price regulated first sales of natural gas.[1] 15 U.S.C. §§ 3311-20. Under Section 504 of the NGPA, it

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[1] A "sale" is defined in Section 2(20) of the NGPA as "any sale, exchange, or other transfer for value." 15 U.S.C. § 3301(20). "First sales" generally include sales by natural gas producers and other sales at the wellhead. *See* 15 U.S.C. § 3301(21).

is unlawful for any person "to sell natural gas at a first sale price in excess of any applicable maximum lawful price." 15 U.S.C. § 3414.

Natural gas producers are generally paid for their gas in monetary form. Frequently, however, the producer receives additional payment in other forms. For example, the producer may receive payment for gas *not* delivered, or may receive free services and other non-monetary consideration. At issue in this case is one type of service frequently performed by pipeline purchasers for producers in consideration for sales of natural gas: the transportation and handling of natural gas liquids and liquefiable hydrocarbons owned by the producer.

When natural gas flows from a well, the gas stream typically includes valuable substances other than methane (the primary constituent of the gas delivered to natural gas consumers). These substances include heavy gaseous hydrocarbons that can be liquefied, and liquid hydrocarbons (oil). In many cases, the producer reserves title to these "liquids or liquefiables" and sells them to others after removal from the gas stream. Declaratory Order at 61021, (App. —). In many cases also, the pipeline purchaser of the gas provides free or underpriced transportation and handling of the liquids and liquefiables for the producer. As the FERC acknowledged in the orders affirmed by the court of appeals, these services constitute "consideration flowing to the producer," the value of which "may very well" "exceed[] the applicable Title I ceiling price for the natural gas." Declaratory Order at 61023, (App. —); Order Denying Rehearing at 61027 n.39 (App. —).

B. Procedural History

In mid-1981, Petitioners and other parties requested a Commission ruling on the relationship between NGPA ceiling prices and free or underpriced pipeline transportation of producer-owned liquids and liquefiables. On

January 17, 1983, the Commission, without conducting any evidentiary proceedings or inviting briefs on the question, issued a Declaratory Order, holding that free or underpriced transportation of producer-owned liquids and liquefiables does not constitute part of the price paid for natural gas. Although the Commission conceded that receipt of some forms of non-monetary consideration (for example, gemstones or real estate) in addition to the maximum lawful price ("MLP") for the gas sold would violate Title I of the NGPA (Declaratory Order at 61027 n. 21 (App. ——)), the Commission concluded that receipt of free or underpriced transportation of liquids and liquefiables in addition to the MLP would not. *Id.* at 61025 (App. ——).

The court of appeals affirmed the Commission, and it is from this decision that Petitioners seek to appeal.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision erroneously affirms the Commission's declaration that natural gas producers may receive the maximum lawful price allowed under the NGPA in cash, *and also* receive additional value in the form of free or underpriced transportation services provided by the pipeline purchaser. This holding is contrary to the plain language of the NGPA, undermines the ceiling price structure established by Congress in that Act, and will permit natural gas producers to retain substantial windfall profits in excess of the consideration permitted by Congress. Moreover, this decision is inconsistent with the Commission's own finding in the same Declaratory Order that *some* forms of non-monetary consideration for the sale of gas (*e.g.*, gemstones and real estate) received in addition to the MLP would violate the NGPA. Section III of the court of appeals' opinion, therefore, decides an important question of federal law which has not been, but should be, settled by this Court.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals' Decision Is Contrary To The Plain Language Of The NGPA, Invites Circumvention Of NGPA Ceiling Price Limitations, And Is Internally Inconsistent.

The NGPA does not limit the term "price" to monetary consideration only. There is no indication in the statute or its legislative history that Congress intended to depart from the widely applied principle that the price paid for goods includes non-monetary consideration, including services.[2] On the contrary, in order to eliminate loopholes that might permit sellers to circumvent ceiling prices, the NGPA itself defines the term "sale"—applied in the statutory phrase "first sale price"—broadly to include transactions in which natural gas is sold in exchange for non-monetary consideration. NGPA § 2(20), 15 U.S.C. § 3301(20) (sales include "any sale, exchange, or other transfer for value").[3]

The Commission's and the Fifth Circuit's decisions invite circumvention of the NGPA Title I ceiling price pro-

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[2] Under the Interstate Commerce Act, for example, it is unlawful for a shipper to pay any transportation rate other than the rate lawfully filed with the Interstate Commerce Commission. 49 U.S.C. § 11903(a). This Court has held that price "concessions are none the less illegal, if made for non-transportation *services*, as long as they result in lowering directly or indirectly transportation costs to the shipper." *Union Pacific R. Co. v. United States*, 313 U.S. 450, 464 (1941) (emphasis added). *See United States v. Food Fair Stores, Inc.*, 417 F.2d 62, 64 (5th Cir. 1969). Similarly, for purposes of "price discrimination" under the antitrust laws, price has been defined to include all forms of monetary and non-monetary consideration including services. *See Indian Coffee Corp. v. Procter & Gamble Co., Inc.*, 482 F. Supp. 1104, 1107-08 (W.D. Pa. 1980) (collecting cases).

[3] Moreover, NGPA § 2(21)(A)(v) expressly authorizes the Commission to expand even further the definition of first sales "in order to prevent circumvention of any maximum lawful price established under this chapter." 15 U.S.C. § 3301(21)(A)(v).

visions not only with respect to the transportation services at issue in this case but also other forms of non-monetary consideration as well. The Court acknowledged this in its opinion:

> [T]he Commission's orders below admittedly raise . . . the specter of opening a gaping loophole in the maximum lawful price provisions in the NGPA. As the Pipelines argue, and with some force, there is considerable frailty in a definition of price that includes money and other tangible property but excludes service of unquestioned value.

August 19, 1985 Opinion at 30 (App. —).

II. The Court Of Appeals' Reasons For Affirming The Commission's Declaratory Order Have No Support In The NGPA Or Its Legislative History.

The Court nonetheless upheld the Commission's orders authorizing the receipt of a natural gas price, including money and services, exceeding the maximum lawful price. The principal basis for its decision was the Court's conclusion that consumers can be protected from the impact of overpriced gas through cost allocation in pipeline rate proceedings under Section 4 of the Natural Gas Act, 15 U.S.C. § 717(c):[4]

> On the special facts of this case, however, the order of the Commission can be sustained. This is so, because the Commission has had a longstanding policy of requiring that pipelines not allocate these costs to the consumer in their rate proceedings. . .

August 19, 1985 Opinion, at 30. Thus, the court approved the violation of congressionally mandated ceiling prices on the ground that the impact of the violation

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[4] AGD does not concede that cost allocation in rate proceedings adequately protects the ultimate consumers of natural gas from excess prices paid to natural gas producers. That issue, however, has no bearing on whether NGPA price ceilings have been violated.

could be mitigated in separate proceedings under a different Act.[5]

The Court's decision is contrary to the clear requirements of the NGPA. Section 504 of the NGPA makes it unlawful for any person "to sell natural gas at a first sale price in excess of any applicable maximum price." 15 U.S.C. § 3414. *See INGAA v. FERC*, 716 F.2d 1, 15 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1615 (1984); *Pennzoil Co. v. FERC*, 645 F.2d 360, 375-76 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). Section 504 contains no exceptions. It does *not* state that a price in excess of the maximum lawful price may be charged where the Commission or the courts believe that consumers can be protected in collateral proceedings under a different Act. The Commission's duty to enforce NGPA price ceilings is absolute.

Moreover, the Commission's authority to adjust those price ceilings is strictly limited.[6] Thus, the Commission

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[5] The Court was also "unpersuaded that Congress intended the Commission to consider this particular service as part of the price." August 19, 1985 Opinion, at 31 (App. ——). Thus, the Court appeared to assume that valuable consideration should not be considered a part of price unless Congress specifically addressed the type of consideration at issue.

However, the NGPA establishes *precise* price ceilings applicable to first sales of natural gas, and the court of appeals acknowledges that the exclusion of free services from consideration as an element of price creates "a gaping loophole" in this regulatory scheme. Given the comprehensive price regulation provisions established by Congress in the NGPA, the court should have assumed that *all* elements of price are regulated in the absence of specific evidence that an exception was intended. *Cf. Public Service Commission v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 336 (1983) ("Given such a comprehensive scheme, we conclude that Congress would have clearly identified, either in the statutory language or in the legislative history, any significant source of production that was intended to be excluded.")

[6] *See Public Service Commission v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 331 (1983) (The NGPA "is designed to supplant the Commission's authority to establish rates for the wholesale market, the market consisting of so-called 'first sales' of natural gas.").

is authorized to establish maximum lawful prices in excess of congressionally-mandated price ceilings only in specific narrowly defined circumstances. Section 107(b) of the NGPA, for example, provides that:

> The Commission may, by rule or order, prescribe a maximum lawful price applicable to any first sale of any high-cost natural gas which exceeds the otherwise applicable maximum lawful price to the extent that such special price is necessary to provide reasonable incentives for the production of such high-cost natural gas.

15 U.S.C. 3317(b). Similarly, Sections 104(b)(2), 106(c) and 109(b)(2) authorize the Commission to raise price ceilings for certain categories of gas when the Commission determines that a higher price is "just and reasonable" under the Natural Gas Act. 15 U.S.C. §§ 3314(b)(2), 3316(c), 3319(b)(2). Finally, Section 110 provides special allowances for the recovery of severance taxes and certain production-related costs. 15 U.S.C. § 3320.

None of these circumstances is applicable here. The Commission did not assert that the instant departure from NGPA ceiling prices was necessary to allow the recovery of production-related costs, nor did it rationalize its order in terms of the rate increase authority prescribed in NGPA Sections 104, 106, 107 and 109. In short, the Commission does not even contend that any of the narrowly defined exceptions to the NGPA Title I maximum lawful price ceilings applies to the producers' receipt of money and services when the total value received exceeds the applicable NGPA ceiling price.

In this case, the Commission and the court of appeals acknowledge that natural gas producers in some circumstances violate Title I of the NGPA by selling gas at a price, including money and other forms of payment, in excess of the maximum lawful price. Neither the Commission nor the Courts may authorize a violation of Title

I, even where they believe that consumers may ultimately be protected from the impact of this violation in separate proceedings under a different Act. The Commission's Declaratory Order is in conflict with the clear language of the NGPA, invites circumvention of NGPA ceiling price limitations, would permit substantial windfall profits not intended by Congress, and is internally inconsistent. Section III of the court of appeals' opinion affirming the Commission's Declaratory Order decides an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, AGD requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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January 15, 1986

* Counsel of Record

APPENDIX

APPENDIX

ASSOCIATED GAS DISTRIBUTORS

Atlanta Gas Light Company

Subsidiaries:

Georgia Gas Company
Georgia Engine Sales & Service Co.
Trustees Investments, Inc.

Baltimore Gas & Electric Company

Subsidiaries:

Safe Harbor Water Power Corporation
Diversfied Holdings, Inc.

Subsidiaries:

Baltimore Biogas, Inc.
Baltimore Capital Resources, Inc.
Resource & Property Management, Inc.

Bay State Gas Company

Subsidiaries:

Bay State Energy Resources, Inc.
Bay State Exploration, Inc.
Bay State Gas Supply, Inc.
Northern Utilities, Inc.

Subsidiary:

Granite State Gas Transmission, Inc.

The Berkshire Gas Company

Boston Gas Company

Parent: Eastern Gas and Fuel Associates

The Brooklyn Union Gas Company

Subsidiaries:

Fuel Resources, Inc.
Gas Energy, Inc.
Star Enterprises, Inc.
Methane Development Corp.

Affiliate: Honeoye Storage Corp.

Central Hudson Gas & Electric Corporation

Subsidiaries:

Central Hudson Enterprises Corp.
Central Hudson Cogeneration, Inc.
CH Resources, Inc.
Greene Point Development Corp.
Phoenix Development Co., Inc.

Chesapeake Utilities Corporation

Subsidiary:

Eastern Shore Natural Gas Co.

Subsidiaries:

Dover Exploration Co.
Skipjack, Inc.
Sharpgas, Inc.

City of Holyoke, Mass., Gas & Electric Department

City of Norwich, Dept. of Public Utilities

City of Westfield Gas & Electric Light Department

Colonial Gas Company

Subsidiaries:

Transgas, Inc. (Mass.)
Massachusetts Associates, Inc. (Mass.)

Commonwealth Gas Co.

Parent: Commonwealth Energy System

Concord Natural Gas Corporation

Subsidiary: Concord Gas Service Corp.

Consolidated Edison Company of New York, Inc.

Delmarva Power & Light Company

Subsidiaries:

Delmarva Energy Company
Delmarva Industries, Inc.
Delmarva Capital Investments, Inc.

Subsidiary: DCII, Inc.

Elizabethtown Gas Company

Parent: NUI Corporation

EnergyNorth, Inc.

Subsidiaries:

Gas Service, Inc.

Subsidiary: Energy Resources Corp.

Manchester Gas Co.

Subsidiaries:

Rent-A-Space of New England, Inc.
EnergyNorth Realty, Inc.

Essex County Gas Company

Fitchburg Gas & Electric Light Company

Subsidiary: Fitchburg Energy Development Co.

Lynchburg Gas Company

Subsidiary: Lynco Development Corp.

New Jersey Natural Gas Company

Parent: New Jersey Resources Corporation

New York State Electric & Gas Corporation

Subsidiary: Somerset Railroad Corporation

North Carolina Natural Gas Corporation

Subsidiaries:

NCNG Exploration Corp.
Cape Fear Energy Corp.

Northeast Georgia Municipal Gas Utilities

City of Bowman, Ga.
City of Buford, Ga.
City of Commerce, Ga.
City of Covington, Ga.
City of Elberton, Ga.
City of Hartwell, Ga.
City of Lawrenceville, Ga.
City of Madison, Ga.
City of Monroe, Ga.
City of Royston, Ga.
City of Social Circle, Ga.
City of Sugar Hill, Ga.
City of Toccoa, Ga.
City of Union Point, Ga.
City of Winder, Ga.

Subsidiaries:

The Connecticut Light & Power Co.
Western Massachusetts Electric Co.
Holyoke Water Power Company
Northeast Utilities Service Co.
Northeast Nuclear Energy Co.

Northern Utilities, Inc.

See Bay State Gas Company

Pennsylvania Gas & Water Company

Parent: Pennsylvania Enterprises, Inc.

Pequot Gas Co.

Philadelphia Electric Company

Subsidiaries:

Adwin Equipment Company
Adwin Realty Company
Conowingo Power Company
Eastern Pennsylvania Development Company
Eastern Pennsylvania Exploration Company
Philadelphia Electric Power Company
The Susquehanna Electric Company
The Susquehanna Power Company

Philadelphia Gas Works

Providence Gas Company

Parent: Providence Energy Corporation

Public Service Company of North Carolina, Inc.

Subsidiary:

PSNC Natural Resources Corporation

Subsidiaries:

Tar Teel Energy Corp.
PSNC Production Corp.
PSNC Exploration Corp.
PSNC Propane Corp.

Public Service Electric & Gas Co.

Subsidiaries:

Energy Development Corporation

Subsidiary:

Gasdel Pipeline System, Inc.

Energy Pipeline Corporation
Energy Terminal Services Corporation
Mulberry Street Urban Renewal Corporation
PSE&G Overseas Finance N.V.
PSE&G Research Corporation

South County Gas Co.

South Jersey Gas Co.

Parent: South Jersey Industries, Inc.

The Southern Connecticut Gas Co.

Parent: Connecticut Energy Corp.

UGI Corporation

Subsidiaries:

AmeriGas, Inc.
UGI Development Co.

Valley Gas Co.

Parent: Valley Resources, Inc.

Washington Gas Light Co.

Subsidiaries:

Crab Run Gas Co.
Davenport Insulation, Incorporated

Subsidiaries:

Cellin Manufacturing, Inc.
Universal Insulation, Inc.
Featherstone Manufacturing Co., Inc.

Frederick Gas Co., Inc.
Hampshire Gas Co.
Shenandoah Gas Co.
Brandywood Estates, Inc.

Subsidiary:

Washington Gas Approved Services, Inc.

Rock Creek Properties, Inc.